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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE  
8

9 USI INSURANCE SERVICES

10 NATIONAL, INC., formerly known as

11 WELLS FARGO INSURANCE

12 SERVICES USA, INC.,

13 Plaintiff,

14 v.

15 STANLEY OGDEN, an individual;

16 MARCIA OGDEN, an individual;

17 ELEANOR O'KEEFE, an individual;

18 LEWIS DORRINGTON, an individual;

19 JOHN HASKELL, JR., an individual;

20 MARY MARK, an individual; CORY

21 ANDERSON, an individual; and ABD

22 INSURANCE AND FINANCIAL

23 SERVICES, INC., a Delaware corporation,

24 Defendants.  
25

NO. 2:17-CV-01394-SAB

**ORDER DENYING  
PLAINTIFF'S MOTION FOR  
NEW TRIAL**

26 Before the Court is Plaintiff's Motion for New Trial, ECF No. 267. The  
27 motion was heard without oral argument. Plaintiff is represented by Thomas Holt,  
28 Megan Crowhurst and Anne Reuben. Defendants are represented by Anna Saber,

**ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL ~ 1**

1 Christopher Banks, Debra Fischer, Molly Terwilliger and Patrick Duffy.

2 After a six-day trial, the jury returned a verdict in favor of Defendants on all  
3 of Plaintiff's claims. The jury was asked if Plaintiff proved that it "suffered  
4 damages by the breach of contract" of the individually-named Defendants and the  
5 jury answered "No" for all Defendants. ECF No. 248.

6 Plaintiff asserts that it received an unfair trial because of the following:

7 1. The Court improperly limited the evidence presented by USI regarding  
8 causation of damages. Plaintiff asserts the Court improperly altered the burden of  
9 proof requiring USI to disprove the false and speculative hypothetical of what  
10 might have occurred had Defendants not breached their contracts.

11 2. The Court erroneously limited Plaintiff's experts to testifying verbatim  
12 from their reports, which improperly excluded valid testimony that would have  
13 explained the experts' opinions. Plaintiff maintains these rulings penalized it for  
14 weaknesses in Defendants' case because Defendant chose not to depose one of its  
15 experts prior to trial and deposed the other expert haphazardly.

16 3. The Court admitted irrelevant and unfairly prejudicial evidence about the  
17 Wells Fargo banking scandal because, in part, the Court itself had "closed [its]  
18 account" with Wells Fargo Bank due to media coverage—something wholly  
19 unrelated to WFIS.

## 20 Motion Standard

21 Rule 59(a) states, "A new trial may be granted ... in an action in which there  
22 has been a trial by jury, for any of the reasons for which new trials have heretofore  
23 been granted in actions at law in the courts of the United States." Fed. R. Civ. P.  
24 59(a)(1). "Rule 59 does not specify the grounds on which a motion for a new trial  
25 may be granted." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir.  
26 2003). Rather, the court is "bound by those grounds that have been historically  
27 recognized." *Id.* Historically recognized grounds include, but are not limited to,  
28 claims "that the verdict is against the weight of the evidence, that the damages are

1 excessive, or that, for other reasons, the trial was not fair to the party moving.”  
2 *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). Trial courts may  
3 grant a new trial only if the verdict is contrary to the clear weight of the evidence,  
4 is based upon false or perjurious evidence, or to prevent a miscarriage of justice.”  
5 *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th  
6 Cir. 2000).

## 7 Analysis

### 8 1. Presentation of Evidence re: Causation

9 Plaintiff argues the Court improperly limited the evidence presented by USI  
10 regarding causation of damages. From the beginning of the trial, Plaintiff’s and the  
11 Court’s understanding of what the trial was about was fundamentally different.  
12 Plaintiff wanted to discuss and present background and context information  
13 regarding the underlying events that supported the court’s finding of liability on  
14 summary judgment. The Court believed the jury trial was about damages and  
15 specifically, whether Defendants caused the requested 10 million dollars in  
16 damages.

17 In 2019, the court issued a ruling on the parties’ Motions for Summary  
18 Judgment. It found that Defendants Ogden and O’Keefe signed a covenant not to  
19 ‘compete as part of the merger between Pettit-Murray and Acordia; Plaintiff was  
20 entitled to enforce the agreements; and Plaintiff established a breach of the  
21 agreement based on Ogden’s and O’Keefe’s admissions during their deposition  
22 that they continued to handle the insurance business of former Wells Fargo clients  
23 on behalf of ABD. ECF No. 128. The court found that no reasonable jury could  
24 find that Defendant Haskell solicited, participated in solicitation, or promoted the  
25 solicitation of Wells Fargo customers, but found Haskell promoted the recruitment  
26 of Wells Fargo employees, specifically Lewis Dorrington, in violation of the 2013  
27 and 2015 agreements. With respect to ABD, the court found it tortiously interfered  
28 with Plaintiff’s contractual expectations when Mr. Ogden and Ms. O’Keefe

1 continued handling insurance business of Wells Fargo clients and when Mr.  
2 Haskell assisted ABD in recruiting his former co-workers but noted that Plaintiff  
3 had not shown that Mr. Ogden breached any common law duties on the limited  
4 record before him. ECF No. 128.

5 Specifically, the court made the following statement: “Even if the fact of  
6 damage arising from Mr. Ogden, Ms. O’Keefe, and Mr. Haskell’s breaches is not  
7 seriously in dispute, plaintiff has not provided “reasonably convincing evidence  
8 indicating the amount of damages’ associated with those breaches.” But the court  
9 went on to say, “Plaintiff, for its part, has not yet established damages associated  
10 with any of the breaches discussed above.” *Id.* at 20.

11 Plaintiff argues the court’s statements should be interpreted as a finding that  
12 damages were caused by Defendants’ breach of contract, and the only issue before  
13 the jury would have been the amount. But that is not what the court wrote. Plaintiff  
14 fails to appreciate that the use of the word “associated” has the same meaning as  
15 the word “caused,” that is, the court concluded that Plaintiff had ‘not yet  
16 established damages” caused by the breaches, and thus causation and the amount  
17 of any damages were the remaining questions for the jury.

18 This understanding of that Order was what informed the Court regarding the  
19 scope of the evidence that Plaintiff would be allowed to present at trial. it was not  
20 appropriate for Plaintiff to retry the liability phase of this case. Rather, the jury was  
21 properly instructed that Plaintiff had shown and the Court had found that  
22 Defendants did breach their agreements, and the question presented to the jury was  
23 whether the breach caused any damages and the amount, if any, of the damages.

24 Plaintiff asserts that during trial, the Court impermissibly shifted the burden  
25 of proof by requiring USI to disprove the false and speculative hypothetical of  
26 what might have occurred had Defendants not breached their contracts. Not so.  
27 The jury instructions, which were agreed to by Plaintiff, properly allocated the  
28 burden of proof. The jury was instructed that Plaintiff had the burden of proving by

1 a preponderance of evidence that it incurred actual economic damages because of  
2 Defendant's breach of contract and the amount of those damages. The jury was  
3 instructed on what actual damages meant. It was instructed that in calculating  
4 Plaintiff's actual damages, the jury was to determine the sum of money that would  
5 put Plaintiff in as good a position as it would have been in if the parties had  
6 performed all of their promises under the contract. And the jury was instructed  
7 regarding "lost net profits," which was the type and scope of the damages  
8 requested in this case. This required Plaintiff to "prove with reasonable certainty  
9 that net profits would have been earned but were not earned because of  
10 Defendant's breach of contract." Did this require Plaintiff to prove a hypothetical?  
11 Yes, but that is the nature of the type of damages that it requested. *See Alaska*  
12 *Rent-A-Car v. Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013)  
13 (noting that damages resulting from the loss of future profits are often an  
14 approximation). Plaintiff was not required to disprove a false and speculative  
15 hypothetical. Instead, Plaintiff was asked to show by a preponderance of the  
16 evidence that it was entitled to claim "lost net profits" because of Defendant's  
17 breach of their agreements.

18 Plaintiff has not shown it is entitled to a new trial based on the Court's  
19 refusal to permit Plaintiff to retry the litigation phase of this case.

## 20 **2. Scope of Plaintiff's Expert Witnesses**

21 Plaintiff argues the Court improperly excluded valid testimony that would  
22 have explained the experts' opinions; instead, the Court erroneously limited  
23 Plaintiff's experts to testifying verbatim from their reports.

24 Fed. R. Civ. P. 26(a)(2)(A) requires that all expert witnesses be disclosed.  
25 Expert witnesses must either prepare a detailed written report under Rule  
26 26(a)(2)(B) or, if not required to provide a written report, the party must disclose:  
27 "(i) the subject matter on which the witness is expected to present evidence under  
28 Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and

1 opinions to which the witness is expected to testify.” Fed. R. Civ. P. 26(a)(2)(C).  
2 Rule 26(a)(2)(B)(i) requires the written report contain “a complete statement of all  
3 opinions the witness will express and the basis and reasons for them.” If a party  
4 fails to provide information required by Rule 26(a), the party is not allowed to use  
5 that information at trial, unless failure to provide the information was substantially  
6 justified or is harmless. Fed. R. Civ. P. 37(c)(1).

7 The Court limited the experts to testify to what was disclosed in their  
8 reports. Fed. R. Civ. P. 26(a)(2)(B) requires experts to provide written reports in  
9 order to prevent unfair surprise at trial. Here, Defendant objected to the jury  
10 hearing opinions that were not contained in the written reports, stating they were  
11 unfairly surprised and would be prejudiced if Plaintiff’s experts were permitted to  
12 testify to opinions not contained in their reports. The Court agreed and limited the  
13 experts to those opinions that were presented in their reports. The Court was within  
14 its authority to do so, and Plaintiff has not shown it is entitled to a new trial based  
15 on the limiting of their experts’ testimony. Additionally, Plaintiff cannot show it  
16 was prejudiced by any limitation to Dr. Nickerson’s testimony because the jury  
17 found that Plaintiff did not show that Defendants’ breach of contract caused  
18 Plaintiff’s damages. Plaintiff could have easily avoided this situation if it had  
19 provided sufficient and complete expert disclosures prior to trial, as required by the  
20 Rules.

### 21 **3. Wells Fargo Banking Scandal**

22 Plaintiff argues the Court unfairly allowed the jury to hear evidence of the  
23 Wells Fargo Banking scandal. Plaintiff suggests the Court was influenced by its  
24 decision to close its accounts in Wells Fargo. It is true the Court made that  
25 statement outside the presence of the jury. Regardless, testimony at trial from  
26 customers and former employees indicated that the scandal was highly relevant to  
27 them and relevant to their decision to leave Plaintiff and seek services and  
28 employment elsewhere. The jury did not hear the challenged comment from the

1 Court, and it had no bearing on the Court's decision. Plaintiff has not shown it is  
2 entitled to a new trial because the jury heard evidence regarding Wells Fargo's  
3 banking scandal.

4 **4. Conclusion**

5 From the beginning of trial, the Court was clear that it saw this as a damages  
6 case. And from the beginning of trial, Plaintiff attempted to present evidence to the  
7 jury regarding liability that went beyond basic background information, which was  
8 not relevant to the question before and unnecessarily prolonged the trial. Plaintiff  
9 was given a fair opportunity to present its damages case to the jury. The jury found  
10 that it did not meet its burden. Most damaging perhaps to Plaintiff's case was the  
11 testimony from former customers that they would not have stayed with Plaintiff if  
12 Defendants Ogden and O'Keefe were no longer servicing their accounts. Also, the  
13 jury could have reasonably found that after Ogden, O'Keefe, and others left,  
14 Plaintiff was not in a position to adequately service the large accounts that  
15 ultimately left to obtain insurance elsewhere.

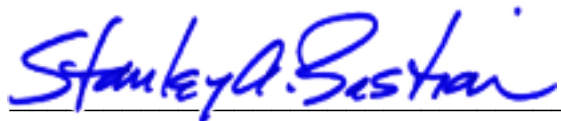
16 Accordingly, **IT IS HEREBY ORDERED:**

17 1. Plaintiff's Motion for New Trial, ECF No. 267, is **DENIED**.

18 2. The joint Stipulation, ECF No. 274, is **GRANTED**.

19 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
20 this Order and to provide copies to counsel.

21 **DATED** this 27th day of June 2023.

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25 U.S. Judge Stanley A. Bastian  
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